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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RYAN JULIAN BLACK, Defendant and Appellant.	B214930 (Los Angeles County Super. Ct. No. GA072410)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a court trial, appellant Ryan Julian Black was convicted of attempted murder (count 1) and shooting at an occupied motor vehicle (count 2), with a street gang enhancement. He was sentenced to 20 years eight months in prison. He contends that (1) there is insufficient evidence of his guilt on the two counts; (2) he did not have fair notice that he would be convicted as an aider and abettor, rather than as the shooter; and (3) there was insufficient evidence for the gang enhancement.

We find no error and affirm.

FACTS

1. Prosecution Evidence

Appellant and the victim, Carlos D., lived in Duarte, "approximately five houses apart on the same side of the street."

Appellant was an admitted member of the Duroc Crips gang. He had numerous tattoos that verified his gang allegiance, including a large one that said "CRIP," another that named the clique of the gang to which he belonged, and another that read "KILLA KALI," which meant he was a "killer from California."

Carlos denied that he was a gang member. However, he had a shaved head that made him look like a gang member, and his brother Henry belonged to the Duarte East Side gang, which was a rival of the Duroc Crips in that area.

Appellant and appellant's brother Brandon both sometimes drove a silver-colored Chrysler Sebring (the Chrysler) that was registered to appellant's mother and to Brandon.

On the evening of the incident, July 13, 2007, Carlos, his girlfriend Maria C. and his friend Roberto V. planned to go to the movies with their friend Luis O., who lived a few blocks from the street where Carlos and appellant lived. Carlos drove his sports utility vehicle (the SUV) to Luis's home and parked at the curb. Maria was in the front passenger seat and Roberto was in the back seat. The Chrysler pulled up next to the SUV and stopped, squealing its brakes. A male African-American in the front passenger seat pointed a gun out of the partially open window and fired twice, from "two or three feet" away. The first shot hit Carlos in the head. The second shot missed. The Chrysler drove

away. The police arrived quickly. The bullet struck Carlos in the ear and exited on the side of his head, leaving fragments in his neck and skull.

There was an issue regarding the identity of the shooter. Carlos testified that he saw the gun pointed at him but did not see the faces of the people in the Chrysler and did not know who shot him. While the crime was being investigated, when he was shown a six-pack photo lineup (six-pack) that included appellant's photo, he circled appellant's photo and wrote, "This guy owned the car that shot me." He testified that appellant lived near him, he had previously seen appellant driving the Chrysler, appellant was known as "Slug," and he knew the Duroc Crips gang was in his neighborhood. He said he did not recall telling Detective Timothy Brennan that appellant belonged to that gang, but he admitted that he was concerned about possible threats to his family from it.

Roberto, who had been in the back seat of the SUV, unequivocally identified appellant as the person he saw shoot Carlos. Roberto said he was familiar with appellant because he had often seen appellant while visiting Carlos in that area. Friends of Carlos who were "East Siders" had told Roberto that appellant belonged to the "Duroc" gang and was known as "Slug." On several occasions when Roberto was at Carlos's home, people drove by and "yelled things." On one occasion, Roberto had seen appellant engaged in that behavior.

Roberto did not initially tell the sheriff deputies that he knew who the shooter was. He first divulged that information to Detective Brennan seven months after the shooting, in February 2008. At that time, Roberto told Brennan "that a guy named Slug had shot his friend in the head several months earlier," the shooting was "a gang thing," "he really didn't want to get involved," he himself was not a gang member, and the shooter "was a Duroc Crip." Once Brennan had that information, he ascertained that appellant was known as Slug, prepared a six-pack with appellant's photo, and showed the six-pack to Roberto. Roberto identified appellant as the person who shot Carlos and also said that a photo of a Chrysler looked like the vehicle used in the shooting.

Prior to the trial, both Roberto and Carlos told Detective Brennan "that they were fearful for their families within the neighborhood and fearful of any other retaliation for them coming to court or identifying anyone."

Maria testified that she heard a gunshot, looked at Carlos, and Carlos told her he had been shot. Maria saw a dark-skinned hand outside the window of the Chrysler and observed that the Chrysler contained three dark-skinned people. Afterwards, Carlos told her not to talk about what happened, as he thought the shooter might have been the male African-American who lived up the street from him and was a member of the Duroc Crips.

Luis testified that he was walking out of his front door when the shots were fired, saw the Chrysler drive away, and did not see who was inside it. He had previously seen appellant driving the Chrysler, knew that appellant lived near Carlos, and had heard that appellant belonged to the Duroc Crips and was called Slug. Luis provided similar information to Detective Brennan when he was interviewed in February 2008.

About two and a half hours after Carlos was shot, a driveby shooting occurred at a residence frequented by Duroc Crips. Carlos's younger brother Geraldo was detained for that shooting, but the charges were later dropped.

Testifying as a gang expert, Detective Brennan explained that the primary activities of the Duroc Crips include shootings, robberies and narcotics activities. Documentary evidence regarding the criminal convictions of two of the gang's members were introduced into evidence. At the time Carlos was shot, there was ongoing gang warfare between the Duroc Crips and Duarte East Side in that part of Monrovia and Duarte. In Brennan's opinion, Carlos was shot as part of that ongoing gang violence, and the shooting occurred "for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further or assist criminal conduct by gang members."

2. Defense Evidence

In response to questions from defense counsel, Detective Brennan testified that Carlos told him in February 2008 that appellant was driving the Chrysler at the time the passenger of the Chrysler shot Carlos.

Appellant's father testified that the front passenger's side window did not open on the Chrysler.

Recalled as a defense witness, Roberto denied that he was afraid of testifying. He said he was willing to identify appellant as the shooter in February 2008, and not previously, because by February 2008 he had been hearing for months "on the street" that appellant was the shooter. He was "certain" he saw appellant shoot Carlos.

DISCUSSION

1. Sufficiency of the Evidence for Counts 1 and 2

At the time it found appellant guilty, the trial court said it was not convinced beyond a reasonable doubt that appellant fired the gun, but it was convinced beyond a reasonable doubt that appellant "was in the car" and "was either the shooter or the driver." Appellant contends there was insufficient evidence that he was in the Chrysler at the time of the shooting or that he aided and abetted the crimes.

Applying the appropriate standard of review (*People v. Catlin* (2001) 26 Cal.4th 81, 139), we find that there was substantial evidence to support appellant's conviction. Although Roberto was certain that appellant was the shooter, the trial court gave appellant "the benefit of the doubt" on whether he was the shooter or the driver. There was sufficient evidence for appellant's culpability as an aider and abettor because he positioned the Chrysler next to the SUV before Carlos was shot, and drove away afterwards. (See *In re Jose D.* (1990) 219 Cal.App.3d 582, 585.) Also, appellant lived on Carlos's street, Roberto and Carlos were familiar with appellant and the Chrysler, appellant had been seen driving the Chrysler in the past, and the ongoing gang warfare in that area created a motive for the shooting. Taken as a whole, there was ample evidence to justify appellant's conviction.

2. The Notice Issue

Appellant contends that he did not have fair notice that he was charged as an aider and abettor, so there was a violation of his rights to due process under the federal and state Constitutions and his Sixth and Fourteenth Amendment rights to counsel when the trial court found him guilty as an aider and abetter. He also argues that the trial court abused its discretion when it refused to grant a new trial based on the unexpected use of the aiding and abetting theory.

A. The Record

Count 1 alleged that appellant committed an attempted willful, deliberate and premeditated murder, and included allegations of personal use and personal discharge of a firearm. Count 2 alleged that appellant shot at an occupied motor vehicle. Both counts included a gang allegation under Penal Code section 186.22, subdivision (b)(1)(C) (section 186.22(b)(1)(C)).[1]

In opening statement, the prosecutor said there would be evidence that appellant pointed a gun at Carlos and fired it.

During the trial, Roberto testified that he saw appellant shoot Carlos. That is also what Roberto told Detective Brennan prior to the trial. However, according to testimony produced through defense questioning, Carlos told Detective Brennan prior to the trial that appellant was driving the Chrysler when the passenger shot at him. There also was evidence that both appellant and his brother Brandon sometimes drove the Chrysler.

In closing argument, the prosecutor reminded the court that Roberto had repeatedly identified appellant as the shooter. In contrast, defense counsel focused on appellant's father's testimony that the front passenger window of the Chrysler could not be opened.

When the trial court discussed the testimony, it found that Roberto was a credible witness who knew appellant and the Chrysler. The court was satisfied that Roberto was

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[1] Subsequent code references are to the Penal Code unless otherwise stated.

willing to identify appellant in February 2008, and not earlier, because the "word was out" by February 2008 that appellant was the shooter. The court recognized that Roberto had no motive to lie and he was corroborated by the evidence of appellant's connection to the Chrysler. The court believed beyond a reasonable doubt that appellant was guilty of count 2, shooting at an occupied motor vehicle, because appellant "was in the car" and "was either the shooter or the driver." It tended to believe Roberto's testimony that appellant was the shooter, but it was not satisfied beyond a reasonable doubt that appellant was the shooter. Therefore, the court found appellant guilty on count 1 of attempted murder, without a finding of premeditation, and without a true finding on the firearm allegations.

Defense counsel's motion for new trial argued that the verdict had to be set aside because the trial court found that appellant was the driver but all the evidence showed that appellant was the shooter.

In denying the motion for new trial, the trial court stated: "I wasn't making any finding that the defendant was a passenger or a driver, per se. [¶] I was finding that I had a legitimate question as to whether or not the defendant was the actual shooter. And I gave him the benefit of the doubt. . . . [¶] . . . [¶] . . . I will be honest with you, I think he was the shooter. I think there was evidence that supports that conclusion. But I can't say beyond a reasonable doubt that he was."

B. Analysis

Under the Sixth Amendment and the due process guarantees of the state and federal Constitutions, a criminal defendant must have fair notice of the charges, which provides a meaningful opportunity to present a defense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1205.) However, the accusatory pleading need not specify the theory of murder on which the prosecution relies. (*Ibid.*) "[G]enerally an accused will receive adequate notice of the prosecution's theory of the case from the evidence adduced at the preliminary examination or the indictment proceedings." (*Ibid.*)

A general charge of murder and the evidence adduced at the preliminary hearing adequately inform the defendant of the prosecution's theory. "Likewise, since direct

perpetrators and accomplices have long been treated by statute as principals equally liable under the law (§§ 31-32) and since a statute specifies that allegations of principal status suffice to proceed on accomplice theories (§ 971), case law has long held due process notice satisfied as to defendants prosecuted as aiders and abettors." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 737.)

Here, although appellant was prosecuted as the shooter, the trial court was not satisfied that appellant was the shooter, but it was satisfied that he was either the shooter or the driver. Detective Brennan testified at the preliminary hearing that (a) Carlos told him appellant was the driver, and (b) Roberto told him appellant was the shooter. The defense had notice that appellant might be convicted under either theory. Indeed, at the trial it was the defense that brought out Carlos's pretrial statement that appellant was the driver. Unlike *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1236, upon which appellant relies, appellant was not affirmatively misled or denied the opportunity to prepare a defense.

We therefore find that appellant had constitutionally adequate notice of the possibility he might be convicted as an aider and abettor.

We further find no abuse of discretion in the denial of the motion for new trial, as there was ample evidence of appellant's guilt and no violation of his constitutional rights.

3. Sufficiency of the Evidence for the Gang Allegation

Appellant received an additional 10-year term due to the finding under section 186.22(b)(1)(C). That finding required evidence that the crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Appellant contends the evidence on that point was insufficient because it did not show that the victims were gang members, that anyone involved in the incident wore gang colors or used gang slogans, that the shootings were gang-related, or that he acted with the specific intent to promote the gang's criminal conduct.

Appellant's contention lacks merit.

Appellant lived on the same street as Carlos and belonged to the Duroc Crips, which was engaged in active gang warfare with the Duarte East Side gang at that time in that area. Carlos denied gang membership, but he looked like a gang member, his brother was in Duarte East Side, he had friends in that gang, and appellant and other people had driven by Carlos's house, yelling. The evidence therefore established that appellant knew Carlos associated with members of Duarte East Side, regardless of whether Carlos himself was a gang member. Also, appellant and his confederates stopped the Chrysler next to the SUV, immediately shot at Carlos, and drove away. The only motive for the shooting was that it was gang-related. Furthermore, Detective Brennan testified that the shooting was committed for the benefit of a gang, and there was a driveby shooting at a Duroc Crips location later on the evening that Carlos was shot. From the combination of all the evidence, we conclude there was substantial evidence from which a rational trier of fact could have found that the section 186.22(b)(1)(C) allegation was proven. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1385.)

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.